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Supreme Court, U.S.

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GIANELLI MONEY PURCHASE PLAN AND TRUST, PENELOPE GIANELLI, TRUSTEE,

Petitioner.

v.

ADM INVESTOR SERVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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September 16, 1998

59 pp

The Federal Arbitration Act ("FAA") provides that an arbitration award may be vacated when, *inter alia*, there was evident partiality on the part of an arbitrator. This Court has interpreted evident partiality to mean a "reasonable impression of partiality". In keeping with this interpretation, the Court has found that when an arbitrator has a substantial interest in a firm which has done more than trivial business with a party to the arbitration, the arbitrator is required to disclose such business.

QUESTIONS PRESENTED

1. Did this Court in its 1968 decision addressing when an arbitration award can be vacated for the evident partiality of an arbitrator, require proof the arbitrator actually knew his firm did substantial business with a party?

2. Assuming this Court has not addressed what state of mind must be proved to establish an improper non-disclosure by an arbitrator, is it better policy to require proof an arbitrator actually knew he had a conflict of interest to establish evident partiality (Eleventh and D.C. Circuits) or is it better policy to require proof an arbitrator probably knew (or should have known) he had a conflict (Ninth Circuit)?

[Petitioner reserves the right to argue Question 3 in the event certiorari is granted on either of the above questions but does not include Question 3 among the reasons for the grant of certiorari].

3. Can pre-arbitration hearing fraud by the prevailing party to an arbitration, which creates a false impression about the arbitrator's impartiality, be a basis for vacating an arbitration award for evident partiality, especially when coupled with other aggravating circumstances?

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ADM INVESTOR SERVICES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner Gianelli Money Purchase Plan and Trust, Penelope Gianelli, Trustee ("Gianelli"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this case on July 22, 1998, in favor of Respondent, ADM Investor Services, Inc. ("ADM").

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 146 F. 3d 1309 and is reprinted in the Appendix hereto, p. 1a *infra*. The Report and Recommendation of the Magistrate Judge, which was approved by the District Court in its entirety, has not been reported. It is reprinted in the Appendix hereto, p. 12a *infra*.

JURISDICTION

Following an adverse ruling before the American Arbitration Association ("AAA") in Orlando, Florida, Petitioner Gianelli, an investor, sought an order vacating the award of the single arbitrator for evident partiality under the Federal Arbitration Act. Following issuance of the Magistrate Judge's report which recommended a favorable ruling for the Petitioner on November 20, 1996, the District Court in Orlando entered an order approving the Magistrate's recommendation on February 7, 1997. Respondent ADM, a futures commission merchant, appealed to the U.S. Court of Appeals for the Eleventh Circuit. That Court reversed on July 22, 1998, and no petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Eleventh Cir-

cuit is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court below was invoked under 28 U.S.C. §1331 and 9 U.S.C. §10.

STATUTE INVOLVED

This case involves the Federal Arbitration Act (FAA), 9 U.S.C. §10, which provides that an arbitration award may be vacated by a district court where there was evident partiality in the arbitrators.

STATEMENT OF THE CASE

A. Facts And Proceedings Below.

ADM is a futures commission merchant licensed with the Commodity Futures Trading Commission ("CFTC"). Basic Commodities, Inc. ("Basic") is also registered with the CFTC. In 1992, ADM and Basic entered into an agreement under which ADM executed commodities trades for customers brought in by Basic. The agreement contained an indemnity provision requiring Basic to indemnify and hold ADM harmless from any damages it incurred because of losses suffered by Basic clients. Basic president Kent C. Kelley ("Kelly") executed this agreement on behalf of Basic, and also personally guaranteed Basic's contractual undertakings.

One of the clients that Basic brought to ADM was Gianelli. Gianelli lost approximately $100,000 from November 1994 through July 1995 as a result of its investments in the futures markets. Gianelli claims that Kelley's mismanagement of its account caused these losses. In an attempt to recoup its losses, Gianelli filed a claim against ADM with the American Arbitration Association ("AAA"). It sought to hold ADM liable on an agency theory, asserting that it was liable for the wrongdoing of and mismanagement by Kelley, Basic's president.

The parties jointly selected Keith Houck ("Houck") as the sole arbitrator. Houck has served as office manager for the law firm of Gray, Harris & Robinson ("Gray Harris") since 1990. Immediately prior to the arbitration hearings, Gianelli discovered that Gray Harris had represented Kelley in a 1992 securities case, the *Neilson* case. ADM had attached a copy of the *Neilson* case to its arbitration Answer. This CCH reported decision listed two (2) of the lawyers from Gray Harris that had represented Kelley but did not mention the Gray Harris law firm. Thus, although the sole arbitrator, upon reading ADM's Answer, would have uncovered (or been reminded of) his firm's representation of Kelley, others reading the Answer and the *Neilson* case attached thereto would not have necessarily known of the Gray Harris/Kelley connection. Notwithstanding,

Gianelli did put two and two together just prior to the arbitration hearing and, accordingly, inquired about the extent of the connection at the beginning of the hearing. Houck asserted that he was unaware of the case, while Kelley asserted (falsely) that this Gray Harris representation of him was an isolated incident.

Additionally, arbitrator Houck was bound by Rule 19 of the AAA Rules which provides that all arbitrators "shall disclose any circumstances likely to affect impartiality including [but not limited to].... any past or present relationship with the parties or their representatives".

In light of all this including Kelley's misrepresentation, Gianelli accepted Houck as the sole arbitrator at the commencement of the hearing. Houck conducted the arbitration hearings on January 25 and 26, 1996. Kelley was present throughout as ADM's personal guarantor, sole corporate representative, and sole factual witness. The proceedings were not recorded and on February 7, 1996, Houck rendered an award in favor of ADM.

Gianelli was particularly disappointed because the hearing had gone so well and because the denial of its claim only took ten days, an extremely fast turn around for a AAA arbitration. Thus, after Houck rendered his decision, Gianelli

looked further into the Kelley/Gray Harris connection and discovered Kelley had had frequent contacts with Gray Harris. In particular, Gray Harris helped Kelley form three companies and represented two others in 1976; the firm also represented Kelley as an individual from 1977 to 1986. Gray Harris had also represented Kelley as the personal representative of a large estate between 1977 and 1986 and as personal representative of another estate which representation lasted up until just a few months before the arbitration claim was filed. Thus, the *Neilson* case was not the only matter the Gray Harris firm handled for Kelley while Arbitrator Houck served as the Gray Harris office manager. [Note: The District Court made these important finding of fact involving the representation of Kelley as the personal representative of these estates, but the Eleventh Circuit somehow overlooked them in its decision. *See* App. 14a-15a]

In light of this longstanding professional relationship between the sole arbitrator's law firm and Kelley, who was ADM's personal guarantor, sole corporate representative and sole factual witness for purposes of the arbitration, Gianelli filed a petition to vacate the arbitration award in District Court, contending that all these factors created a reasonable impression of partiality. ADM subsequently filed a cross-petition to confirm the arbitration award. The matter was

referred to a magistrate judge, who issued a report recommending that the district judge grant Gianelli's petition to vacate the arbitration award. The district court adopted the report and recommendation and vacated the arbitration award. Thereafter, ADM successfully appealed to the Eleventh Circuit.

B. The Legal Analysis Of The Eleventh And This Court's Holding In *Commonwealth Coatings*.

The Eleventh ruled that evident partiality of an arbitrator only exists when (1) an actual conflict exists or (2) when an arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists. [It is the second test which is the subject of this Petition.] In establishing this second test, the Eleventh makes no mention of this Court's decision in *Commonwealth Coatings, v. Continental Casualty Co.*, 393 US 145, (1968), which was relied on by the District Court in vacating the instant award and which was, in recent years, relied on by the Ninth Circuit to vacate an award on similar facts. Rather, the Eleventh put forth the following legal analysis.

> In vacating the arbitration award in this case, the district court relied heavily on *Schmitz v. Zelveti*, 20 F. 3d 1043 (9th Cir. 1994). In that

case, the Ninth Circuit found evident partiality where an arbitrator, who was also an attorney, did not investigate potential conflicts or disclose that his firm had performed legal work for one of the parties' corporate parents. *See, id.* at 1048. *Schmitz* held that the arbitrator's failure to investigate could create a reasonable perception of partiality. *See, id.* at 1048-49.

The district court found *Schmitz* to be closely analogous to this case. In particular, the court noted that, as in *Schmitz*, the arbitrator (Houck) was employed by a law firm (Gray Harris) that had a long-standing relationship with someone closely connected to one of the arbitrating parties (Kelley). Furthermore, the district court reasoned that had Houck investigated possible conflicts of interest as *Schmitz* requires, he would have discovered the previous work that Gray Harris had performed for Kelley, and disclosure of that relationship would have afforded Gianelli a more informed basis upon which to decide whether to proceed with Houck as arbitrator. Therefore, the district court, following *Schmitz*, concluded that it should vacate the arbitration award.

The problem with the district court's analysis is that *Schmitz* conflicts with the law of this Circuit. In *Lifecare Int'l, Inc. v. CD Medical, Inc.*, 68 F.3d 429 (11th Cir. 1995), the arbitrator accused of "evident partiality" became "of counsel" to a law firm that had two contacts with CD Medical, including one "for the purpose of obtaining representation in the instant dispute." *Id.* at 434. This Court noted that even the most routine background check by the arbitrator would have brought this information to light. However, we also pointed out that there was no evidence that the arbitrator was actually aware of these past contacts. Because there was no evidence that the arbitrator had actual knowledge of the past contacts, we confirmed the arbitration award and rejected the proposition that the arbitrator had a duty to investigate the past contacts to avoid evident partiality. In the present case it was error for the district court to rely on *Schmitz*, because its holding that an arbitrator's failure to investigate past contacts with one of the parties may constitute "evident partiality" is squarely at odds with the position we took in *Lifecare*. Instead of following *Schmitz*, the district court should have applied the law of our

> circuit, which is that an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when... (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exits. *See, Lifecare*, 68 F.3d at 433.... There is nothing in the record to indicate that Houck [actually] knew of any connection between Kelley and Gray Harris prior to 1990, when Houck joined the firm.... Because Houck did not have actual knowledge of the information upon which the alleged "conflict" was founded, the second "evident partiality" condition is not present in this case. [End of the Eleventh's legal analysis]

[Note: The Eleventh's legal analysis makes no mention of this Court's decision in *Commonwealth Coatings* upon which the District Court relied and upon which the Ninth Circuit relied in *Schmitz*. A reading of Justice Black's *Commonwealth Coating's* holding and Justice White's concurrence demonstrates why. Proving the arbitrator had actual knowledge of his conflict of interest is not a part of the *Commonwealth* test.

In vacating an award for "evident partiality" Justice Black held, at 149:

> [The courts] should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since... [arbitrators]... have completely free rein to decide the law as well as the facts and are not subject [as a general rule] to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the single requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias..... [A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another. [Emphasis Supplied]

In his concurring opinion Justice White adopted Justice Black's opinion and made some additional remarks at 150-152:

> While I am glad to join my Brother Black's opinion in this case, I desire to make these additional remarks.... [Arbitrators should not be] automatically disqualified by a

> business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial... [Emphasis Supplied]

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Position That "Evident Partiality" Only Exists In An Arbitrator If The Complaining Party Demonstrates The Arbitrator Actually Knew He Had An Undisclosed Conflict Of Interest, Rather Than Proof He Probably Knew Or Should Have Known Of The Conflict, Is Not Only Contrary To A Decision Of This Court, It Is Too Burdensome Given That Actual Knowledge Is So Difficult To Prove And Given That Arbitration Awards Are Seldom Subject To Appellate Review For Mistakes Of Law Or Fact.

The instant case conflicts with this Court's decision in *Commonwealth Coatings*. *Commonwealth Coatings* places an affirma-

tive duty on arbitrators to disclose all dealings that might create an impression of bias as it describes the duty to disclose as a "requirement". The practical effect of the Eleventh's ruling is to relieve arbitrators of this requirement unless knowledge of these dealings can be attributed to them. Highly unscrupulous arbitrators or possibly arbitrators who just don't want to give up their arbitration fees, but who know they have a conflict of interest, will position themselves so as to make proof they actually knew of their conflict very difficult, if not impossible. Parties to an arbitration will not only have to worry about presenting their case on the merits, they will have to concern themselves with an arbitrator's impartiality because if facts come to light after the arbitration hearing demonstrating a party may not have received a fair hearing, that party will be saddled with the result unless he or she can prove the arbitrator had first hand knowledge of the conflict. *Commonwealth Coatings* would give such an arbitration party, unable to prove first hand knowledge, an opportunity to demonstrate evident partiality through other means. That is, by only demonstrating an arbitrator probably knew or should have known he had an undisclosed conflict of interest. The similarity of the facts in *Commonwealth* and the instant case bear this out.

The questionable arbitrator's employer in *Commonwealth* did substantial business with one of the parties spanning many years just like arbitrator Houck's firm did for Kelly in the instant case. In each case, the arbitrator did not disclose this long-standing business relationship to the party's adversary prior to the hearing. Also, in *Commonwealth* and the instant case, the neutrality of the arbitrator in question was particularly important. In *Commonwealth* each side had selected their own arbitrator, that is, their person, and these two people had agreed on a third "neutral" arbitrator. Thus, the so called "neutral" arbitrator's impartiality was critical in *Commonwealth Coatings*. In the instant case, the sole arbitrator's impartiality was also critical because he was acting alone and was tantamount to the so called "neutral" third arbitrator in *Commonwealth Coatings*, who, more likely than not, had tremendous influence during the *Commonwealth* arbitration proceeding because there was a strong likelihood he would be the swing vote.

On the other hand, the facts in *Lifecare Int'l, Inc. v. CD Medical*, 68 F.3d at 434, relied on by the Eleventh, are quite different from *Commonwealth* and the instant case. The undisclosed business ties with the arbitrator's law firm in *Lifecare* were minimal, occurred entirely before the arbitrator affiliated with the law firm and most importantly,

were with the non-prevailing party. Thus, the business ties, unlike the instant ties and the *Commonwealth* ties, were tantamount to harmless error. Also, the arbitrator in *Lifecare* was one of three panel members, not a sole arbitrator deciding the matter, as the instant arbitrator did, like a judge at a bench trial. Finally, the arbitrator in *Lifecare* had a very informal relationship with the law firm in question, as he only became "of counsel" to the firm and then, as noted above, only after the minimal business ties in question had ended.

In any event and as previously noted, in vacating the award in *Commonwealth* for "evident partiality" Justice Black held, at 149:

> [The Courts] should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject [as a general rule] to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the single requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias..... [A]ny tribunal permitted by law to try cases and controversies not only

> must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another. [Emphasis Supplied]

Also and as previously noted, Justice White specifically adopted Justice Black's opinion and added the following at 150-151:

> [Arbitrators should not be] automatically disqualified by a business relationship with the parties before them <u>if both parties are informed of the relationship in advance</u>, <u>or if they are unaware of the facts but the relationship is trivial....</u> [Emphasis Supplied]

Although the arbitrator in *Commonwealth* probably knew he had a conflict of interest, this Court did not require the complaining party prove he actually knew of the conflict. That is, this Court did not make actual knowledge a part of its test in holding that arbitrators have an affirmative duty, by way of a "requirement", to disclose all dealings that might create an impression of possible bias. This makes good sense for requiring the complaining party to prove the arbitrator

had actual knowledge of his conflict before he or she can establish evident partiality is too burdensome given the extraordinary latitude arbitrators are given in deciding the law and facts. This is especially true when the arbitrator under suspicion is deciding the case "solo", rather than deciding the case as one of three panel members, and his law firm has represented the prevailing party time and again for over twenty years. Arbitrators should have a duty, within reason, to disclose the dealings their affiliates have had with a party that are more than trivial. *Commonwealth* contemplates a reasonable effort to search out such dealings as it speaks in terms of arbitrators being required to disclose such dealings. It does not obligate the parties to the arbitration to ferret out an arbitrator's dealings with his or her adversary as the recent decision of the Eleventh will have the practical effect of doing.

Requiring proof an arbitrator knew he had a conflict is not only contrary to *Commonwealth*, it is particularly bad policy when applied to the facts of this case. The Court will recall that not only did we have a single arbitrator conducting what was tantamount to a bench trial, we had an arbitrator who was operating under AAA (American Arbitration Association) Rule 19, which required the fullest disclosure. In *Commonwealth*, Justice Black cited to the AAA disclosure Rule then in

effect even though the *Commonwealth* arbitration was not decided under the AAA Rules. That Rule only "requested" that an arbitrator disclose circumstances that might disqualify him. The present AAA disclosure rule, which applied in the instant arbitration, does not "request" disclosure, it commands disclosure by the arbitrator as it requires an arbitrator to make such disclosures. It states each arbitrator "shall disclose any circumstances likely to effect impartiality [including but not limited to] ...any past or present relationships with the parties or their representatives". Even Justice Fortas, who dissented in *Commonwealth*, at 154 and N. 2, indicated he would have joined in the decision of the Court if, as here, a rule mandating disclosure of all dealings past and present had been in effect.

The instant arbitrator was also put on notice through the core pleadings that he had a possible conflict. Further, his law firm's client, Kelley, was the prevailing party's personal guarantor, sole corporate representative and sole factual witness for the purposes of the arbitration hearing. Finally, this guarantor/representative/fact witness, Kelley, falsely stated on the record at the commencement of the arbitration hearing that the sole arbitrator's law firm had represented him only once.

From these facts, a reasonable impression of partiality would, under any common sense definition of the terms, exist. It would certainly exist under Justice Black's rule of law and Justice White's as well for Justice White also speaks in terms of arbitrators having a burden to disclose all business dealings that are not trivial. Thus, the Court should grant certiorari because the decision of the Eleventh is contrary to the *Commonwealth* decision of this Court. The Eleventh requires proof the arbitrator actually knew of his conflict when a reasonable impression of possible bias can be demonstrated without showing actual knowledge per *Commonwealth*.

II. Assuming This Court's *Commonwealth Coatings* Decision Does Not Address What State Of Mind Must Be Proved To Establish Evident Partiality, The Court Should None-The-Less Set A Consistent Course For The Courts Because The Circuits Are Now Clearly Split On What State Of Mind Must Be Proved, Because Maintaining People's Confidence In The Integrity Of The Arbitral Process Is Of Paramount Importance If Its Popularity Is

To Continue And Because When The Court Did Address The Issue Of Evident Partiality Thirty Years Ago, It Was Quite Divided.

As acknowledged in the instant decision of the Eleventh Circuit, there is a split amongst the Circuits. As the Eleventh states:

> The problem with the district court's analysis is that *Schmitz* [out the Ninth Circuit] conflicts with the law of this Circuit.... In the present case, it was error for the district court to rely on *Schmitz*, because its holding that an arbitrator's failure to investigate past contacts with one of the parties may constitute "evident partiality" is squarely at odds with the position we took in *Lifecare*.

See also, Al-Harbi v. Citibank N.A., 85 F. 3d 680, 682-683, (D.C. Cir. 1996), (the D.C. Circuit, like the Eleventh, holding that the complaining party to the arbitration must show the arbitrator actually knew of his undisclosed conflict and further, that arbitrators have no duty to run conflict searches or similar searches).

The Eighth Circuit has set forth a plausible explanation for the split. In *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F. 3rd 157, 159 (8th Cir. 1995), the Eighth states:

> The leading case on evident partiality is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1966). In *Commonwealth Coatings* the Supreme Court held an arbitrator's nondisclosure of a close business relationship with a party to the arbitration showed evident partiality warranting vacation of the arbitration decision, despite the absence of actual bias on the arbitrator's part. *Id.* at 147-50, 89 S.Ct. at 338-40.... In condemning the nondisclosure, a majority of the Supreme Court stated arbitrators must "avoid even the appearance of bias," *If.* at 150, 89 S.Ct. at 340, and must "disclose to the parties any dealings that might create an impression of possible bias," *Id.* at 149 89 S.Ct. at 339.... Justice White wrote a concurring opinion, in which Justice Marshall joined, expressly joining the majority opinion and adding that arbitrators must disclose a business relationship if the arbitrator has a substantial interest in a firm that does more than

> trivial business with a party. *Id.* at 150-52, 89 S.Ct. at 340-41.
>
> Because the concurring opinion presents an arguably narrower standard and the votes of concurring Justices White and Marshall were needed to create a majority, there is some uncertainty among the courts of appeals about the holding of *Commonwealth Coatings*.

In light of this uncertainty, which assumes *Commonwealth Coatings* does not give direction on what state of mind must be proved to established evident partiality, what would be the better policy? Requiring proof of actual knowledge of an undisclosed conflict (D.C. and Eleventh Circuits) or proof the arbitrator probably knew (or should have known) of his undisclosed conflict (Ninth Circuit). Requiring the complaining party to prove the arbitrator knew he had a conflict in order to establish evident partiality will no doubt invite foul play. As previously noted, arbitrators who want to hear cases notwithstanding their business ties to a party will simply not disclose the ties and position themselves so as to make proof of actual knowledge difficult, if not impossible. People's confidence in the arbitral process, especially on the consumer side because consumers seldom if ever have such ties, will fade.

The Eleventh's rule will not only encourage foul play by arbitrators, it will encourage foul play by a party to an arbitration who has business ties to an arbitrator. As noted above, in the instant case, ADM's corporate representative, guarantor and factual witness, falsely stated that the *Neilson* case was an isolated incident at the beginning of the arbitration hearing. If Kelley was willing to make this misrepresentation, no doubt he was willing to let one of the senior law partners at Gray Harris know who his arbitrator was and that he was ADM's guarantor for purposes of the arbitration. The Ninth Circuit said it best in *Schmitz* when it took a more common sense approach as to what should be necessary to establish evident partiality, at 1048:

> The district court's conclusion [of which we disapprove] appears to be premised on the idea that no person could reasonably conclude that an arbitrator could act partially based on facts of which he was unaware. This premise is Appellees' [the securities brokers'] only argument on appeal regarding the evident partiality of Conrad [one of the three arbitrators].
>
> Appellants [the investors] have a better argument. Though lack of knowledge may prohibit actual bias,

it does not always prohibit a reasonable impression of partiality. As Appellants [the Investors] argue, an arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*. For instance, the parties can expect a lawyer/arbitrator to investigate and disclose conflicts he has with actual parties to the arbitration. *Close v. Motorists Mut. Ins. Co.*, 21 Ohio App.3d 228, 486 N.E.2d 1275 (1985) (holding that the failure to do so created a reasonable impression of partiality under *Commonwealth Coatings*). The NASD Code required Conrad, a lawyer, to make such an investigation regarding the actual parties to this arbitration. In the typical lawyer/ arbitrator's case, lack of knowledge of a conflict may preclude a finding of actual bias. However, a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it. 486 N.E. 2d at 1278-79. That the lawyer forgot to run a conflict check or had forgotten that he had previously represented the party is not an excuse.

See, In re. Seigal, 153 NYS 2d 673 (Sup. Ct. 1956). Also, an arbitrator may not know facts of which he may have been suspicious or of which he was on notice which, if true, would create a reasonable impression of partiality if not investigated and disclosed.

Requiring arbitrators to make investigations in certain circumstances gives arbitrators an incentive to be forthright with the parties, honestly disclosing what arbitrators might otherwise have an incentive to hide.

Similarly, AAA Rule 19 placed an affirmative duty on arbitrator Houck to perform a conflict search or similar search. As previously noted, this Rule does not request disclosure, it mandates disclosure. Even more aggravating, the arbitration Answer, to which the *Neilson* case was appended, put arbitrator Houck on notice of his ethical problems.

See also, Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F. 3d 157, 159 (8th Cir. 1995), (the Eight Circuit citing *Schmitz* with approval and holding that an arbitrator is required to disclose his employer's business dealings with a party that are more than trivial even though the arbitrator was not personally involved with the dealings).

Thus, assuming *Commonwealth Coatings* does not give direction on the state of mind that must be demonstrated to prove evident partiality, the Court should grant certiorari because there is clear split amongst the Circuits. The Eleventh and D.C. Circuits require proof of actual knowledge and the Ninth Circuit (and probably the Eight Circuit which has cited to the Ninth's position with approval) require less. Finally, requiring proof the arbitrator probably knew or should have known about an undisclosed conflict makes much greater sense as it will maintain the integrity of the arbitral process and promote its continued use, especially by those persons who are less apt to have business ties to arbitrators.

CONCLUSION

The Court should grant this petition for certiorari because the decision of the Eleventh is contrary to a decision of this Court, because the Eleventh acknowledges its decision is squarely at odds with a decision of another circuit and because the Federal Arbitration Act should be construed consistently and, if possible, so as to encourage the use of arbitration.

Respectfully submitted,

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September 16, 1998

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APPENDIX B

Report and Recommendation of the Magistrate Judge which was approved by the U. S. District Court in Orlando, Florida Vacating Arbitration Award.... 12a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2586

D.C. Docket No. 96-469-CIV-ORL-18

GIANELLI MONEY PURCHASE PLAN AND TRUST, PENELOPE GIANELLI, Trustee,

Plaintiffs-Appellees,

versus

ADM INVESTOR SERVICES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(July 22, 1998)

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

CARNES, Circuit Judge:

ADM Investor Services, Inc. ("ADM") appeals the district court's order vacating an arbitration award in its favor. The district court concluded that the arbitrator had displayed "evident partiality" because of past business contacts between his employer and ADM's corporate representative at the arbitration. Because we hold that an arbitrator cannot be guilty of "evident partiality" absent actual knowledge of a real or potential conflict, we conclude that the district court erred in vacating the arbitration award. Accordingly, we reverse the district court's order and remand with instructions to grant ADM's cross-petition for confirmation of the arbitration award.

I. BACKGROUND

ADM is a futures commission merchant licensed with the Commodity Futures Trading Commission ("CFTC"). Basic Commodities, Inc. ("Basic") is also registered with the CFTC. In 1992, ADM and Basic entered into an agreement under which ADM executed commodities trades for customers brought in by Basic. The agreement contained an indemnity provision requiring Basic to indemnify and hold ADM harmless for any damages it incurred because of losses suffered by Basic clients. Basic president Kent C. Kelley ("Kelley") executed this agreement on behalf of Basic, and also personally guaranteed Basic's contractual undertakings.

One of the clients that Basic brought to ADM was the Gianelli Money Purchase Plan and Trust, Penelope Gianelli,

Trustee ("Gianelli"). Gianelli lost approximately $100,000 from November 1994 through July 1995 as a result of its investments in the futures markets. Gianelli claims that Kelley's mismanagement of its account caused these losses. In an attempt to recoup its losses, Gianelli filed a claim against ADM with the American Arbitration Association ("AAA"). It sought to hold ADM liable on an agency theory, asserting that it was liable for the wrongdoings and mismanagement of Kelley, Basic's president.

The parties jointly selected Keith Houck ("Houck") as sole arbitrator. Houck has served as officer manager for the law firm of Gray, Harris & Robinson ("Gray Harris") since 1990. Immediately prior to the arbitration hearings, Gianelli discovered that Gray Harris had represented Kelley in a 1992 securities case, the Neilson case. When Gianelli asked about this, Houck asserted that he was unaware of the case, while Kelley asserted (falsely) that Gray Harris's representation of him was an isolated incident. In addition, Houck signed an Arbitrator's Oath which stated that he had nothing to disclose. After receiving these assurances, Gianelli accepted Houck as the sole arbitrator. Houck conducted the arbitration hearings on January 25 and 26, 1996. Kelley was present throughout the hearing, and the district court found that Kelley was ADM's corporate representative at the "mediation." The proceedings were not recorded. On February 7, 1996, Houck rendered an award in favor of ADM, finding it not liable to the Trust.

Gianelli contends that, after Houck rendered the decision in favor of ADM, it discovered Kelley had frequent contact with Gray Harris. In particular, Gray Harris helped Kelley form three

companies and represented two others in 1976; the firm also represented Kelley as an individual from 1977 to 1986. On May 2, 1996, Gianelli filed this petition to vacate the arbitration award, contending that Houck, as an employee of Gray Harris, had displayed partiality to ADM. ADM subsequently filed a cross-petition to confirm the arbitration award. The matter was referred to a magistrate judge, who, after hearing oral argument, issued a Report and Recommendation recommending that the district judge grant Gianelli's petition to vacate the arbitration award. The district court adopted that Report and Recommendation in its entirety, and vacated the arbitration award. ADM appeals.

II. STANDARD OF REVIEW

We have previously held that we review an order vacating an arbitration award *de novo*. *See Robbins v. Day*, 954 F.2d 679, 681 (11th Cir.1992). We justified that standard of review, which is more stringent than the abuse of discretion standard under which we reviewed orders confirming arbitration awards, by relying on the federal policy favoring arbitration and limited review of arbitral awards. *See id.* at 682. Since we issued our decision in *Robbins*, however, the Supreme Court has provided additional instruction about the proper standard that courts of appeals must use to review orders confirming or vacating arbitration awards. Of course, "[w]here prior panel precedent conflicts with a subsequent Supreme Court decision, we follow the Supreme Court decision." *Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir.1996); *accord, e.g., Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir.1992).

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947, 115 S.Ct. 1920, 1926, 131 L.Ed.2d 985 (1995), the Court indicated that where the district court has confirmed an arbitration award, the appellate court must review the district court's factual findings for clear error and its holdings of law *de novo*. Several other courts of appeals have concluded that *First Options* mandates the same standard whether the order being reviewed confirms or vacates the arbitration award. *See, e.g., Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 31 (2d Cir.1997) ("We review a district court decision upholding or vacating an arbitration award de novo on questions of law and for clearly erroneous findings of fact."); *Barnes v. Logan*, 122 F.3d 820, 821 (9th Cir.1997) ("Appellate courts review the confirmation or vacation of an arbitration award like any other district court decision ... accepting findings of fact that are not "clearly erroneous' but deciding questions of law de novo.") (internal quotes omitted), *cert. denied*, — U.S. —, 118 S.Ct. 1385, 140 L.Ed.2d 645 (1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135 (6th Cir.1996) ("When reviewing a district court's decision to vacate or confirm an arbitration award, we review findings of fact for clear error and questions of law de novo.").

We also conclude that *First Options* requires us to apply the same standard of review to orders vacating arbitration awards as we apply to orders confirming arbitration awards. Three considerations that the Supreme Court identified in *First Options* compel that conclusion. First, the Court stated that "it is undesirable to make the law more complicated by proliferating

review standards without good reasons." *First Options*, 514 U.S. at 947, 115 S.Ct. at 1926. Second, the Court indicated that the policy considerations that work to create a presumption of validity for arbitration awards cannot be the basis for a two-tiered review system, depending on whether the district court confirmed or vacated the award. Specifically, the Court stated,"[T]he reviewing attitude that a court of appeals takes toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result." *See id.* (internal quotes omitted). That statement directly undercuts our position in *Robbins* that the policy favoring confirmation of arbitration awards justifies different standards of review depending on whether we are reviewing an order confirming or vacating an arbitration award. *See Robbins*, 954 F.2d at 682.

Finally, the Supreme Court stated that the policy giving arbitrators considerable leeway in their decision making does not mean that reviewing courts should give additional deference to district courts when they confirm arbitration awards. *See First Options*, 514 U.S. at 947, 115 S.Ct. at 1926. We cannot hold orders vacating an arbitration award to a stricter standard, because doing so would accord greater deference to orders confirming awards, and *First Options* prohibits that. Our *Robbins* decision and any others providing a dual standard of review for arbitration orders must yield to *First Options*. Accordingly, orders vacating arbitration awards, like orders confirming them, are to be reviewed for clear error with respect to factual findings and *de novo* with respect to the district court's legal conclusions.

III. DISCUSSION

The Federal Arbitration Act ("FAA") provides that a federal district court can vacate an arbitration award, but only in extremely narrow circumstances. *See* 9 U.S.C. § 10. One of the grounds the FAA expressly sanctions as a basis for vacating an arbitration award is partiality on the part of the arbitrators:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the application—
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.

9 U.S.C. § 10(a). The district court relied on that ground—evident partiality, not corruption—in vacating the arbitration award in this case. Specifically, it concluded that Kelley's frequent business contacts with Gray Harris, Houck's employer, would lead a reasonable person to conclude that Houck "was tainted with evident partiality."

We begin our analysis by noting that the purpose of the Federal Arbitration Act was "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." *O.R. Securities, Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 745 (11th Cir.1988) (internal quotes omitted). Judicial

review of arbitration awards is "narrowly limited," and the FAA presumes that arbitration awards will be confirmed. *See Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1188 (11th Cir.1995). Therefore, the "evident partiality" exception is to be strictly construed, as it must be if the federal policy favoring arbitration, *see, e.g., Booth v. Hume Publ'g, Inc.*, 902 F.2d 925, 932 (11th Cir.1990), is to be given full effect. The alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir.1982) (internal quotes omitted); *see Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1015 (11th Cir.1998).

In vacating the arbitration award in this case, the district court relied heavily on *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir.1994). In that case, the Ninth Circuit found evident partiality where an arbitrator, who was also an attorney, did not investigate potential conflicts or disclose that his firm had performed legal work for one of the parties' corporate parents. *See id.* at 1048. *Schmitz* held that the arbitrator's failure to investigate could create a reasonable perception of partiality. *See id.* at 1048-49.[1]

The district court found *Schmitz* to be closely analogous to this case. In particular, the court noted that, as in *Schmitz*, the arbitrator (Houck) was employed by a law firm (Gray Harris) that

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[1]We note that although *Schmitz* cites to our decision in *Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir.1982), it does so only for the proposition that "[s]ome courts have considered an arbitrator's lack of knowledge as a factor in determining whether evident partiality was present." *Schmitz*, 20 F.3d at 1048.

had a long-standing relationship with someone closely connected to one of the arbitrating parties (Kelley). Furthermore, the district court reasoned that had Houck investigated possible conflicts of interest as *Schmitz* requires, he would have discovered the previous work that Gray Harris had performed for Kelley, and disclosure of that relationship would have afforded Gianelli a more informed basis upon which to decide whether to proceed with Houck as arbitrator. Therefore, the district court, following *Schmitz*, concluded that it should vacate the arbitration award.

The problem with the district court's analysis is that *Schmitz* conflicts with the law of this Circuit. In *Lifecare Int'l, Inc. v. CD Medical, Inc.*, 68 F.3d 429 (11th Cir.1995), the arbitrator accused of "evident partiality" became "of counsel" to a law firm that had two contacts with CD Medical, including one "for the purpose of obtaining representation in the instant dispute." *Id.* at 434. This Court noted that even the most routine background check by the arbitrator would have brought this information to light. However, we also pointed out that there was no evidence that the arbitrator was actually aware of these past contacts. Because there was no evidence that the arbitrator had actual knowledge of the past contacts, we confirmed the arbitration award and rejected the proposition that the arbitrator had a duty to investigate the past contacts to avoid evident partiality. In the present case it was error for the district court to rely on *Schmitz*, because its holding that an arbitrator's failure to investigate past contacts with one of the parties may constitute "evident partiality" is squarely at odds with the position we took in *Lifecare*.

Instead of following *Schmitz*, the district court should have applied the law of our circuit, which is that an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists. *See Lifecare*, 68 F.3d at 433; *Levine*, 675 F.2d at 1202 (party challenging arbitration award must establish reasonable impression of partiality that is "direct, definite and capable of demonstration rather than remote, uncertain and speculative.") (internal quotes omitted). Whether these conditions have been met ordinarily requires a fact-intensive inquiry. *See Lifecare*, 68 F.3d at 435.

Performance of that inquiry here leads us to conclude that neither of the conditions for "evident partiality" exists in this case. The district court made a factual finding, supported by the evidence in the record, that Houck was not actually biased against Gianelli. Therefore, the first condition under which an award may be vacated for evident partiality, the existence of an actual conflict, was not present in this case.

As for the second condition, the district court did not expressly find that Houck was aware of Kelley's involvement with Gray Harris with the exception of the Neilson case, and Houck became aware of that only when Gianelli informed him immediately prior to the arbitration hearings. Gianelli accepted Houck as an arbitrator with full knowledge of Gray Harris' representation of Kelley in the Neilson case. Therefore, Houck's knowledge of that connection cannot be the basis for a finding of "evident partiality."

It is not entirely clear from the district court opinion whether it implicitly found that Houck was aware of any relationship Kelley had with Gray Harris other than the Neilson case. However, if the district court did make such an implicit finding, that finding is clearly erroneous. All of Kelley's contacts with Gray Harris, with the exception of the Neilson case, pre-date Houck's employment at the firm. There is nothing in the record to indicate that Houck knew of any connection between Kelley and Gray Harris prior to 1990, when Houck joined the firm. Although given abundant opportunity to do so, Gianelli, who has the burden of persuasion, has not pointed to any evidence suggesting that Houck was aware of any relationship between Kelley and Gray Harris other than the Neilson case. As a result, the only conclusion that the record will support is that Houck was unaware of any other relationship. Because Houck did not have actual knowledge of the information upon which the alleged "conflict" was founded, the second "evident partiality" condition is not present in this case.

We reverse the district court's order vacating the arbitration award in favor of ADM and remand with instructions that the district court grant ADM's cross-petition for confirmation of the arbitration award.

REVERSED and REMANDED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 96-469-Civ-Orl-18

GIANELLI MONEY PURCHASE PLAN AND TRUST, PENELOPE GIANELLI, TRUSTEE,

Plaintiffs,

v.

ADM INVESTOR SERVICES, INC.,

Defendant.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This action is one to vacate an arbitration award pursuant to 9 U.S.C. § 10. Petitioners ("Gianelli") contend that the award should be set aside because of the apparent partiality of the sole arbitrator in the case (Doc. No. 1). Respondent ("ADM") has cross–moved for confirmation of the award (Doc. No. 8).

Pursuant to Order of the presiding judge, an evidentiary hearing[1] was held before the magistrate judge, and the parties submitted oral and written arguments. Based upon the evidence submitted, the matters contained in the record, and the applicable law, it is recommended that the award be set aside.

FACTS

This is a dispute over whether an arbitration award in favor of and absolving ADM should be vacated due to the alleged "evident partiality" of the sole arbitrator. The underlying dispute involved an agreement to trade commodities and options. The agreement provided that disputes were to be arbitrated before the American Arbitration Association. Pursuant to that agreement, the parties selected Keith Houck (herein "Houck") as the sole arbitrator. Houck has been the office manager for the Gray Harris & Robinson law firm (herein "Gray Harris" or "the Firm") since 1990. In the Martindale–Hubbell listing for the Firm (Ex. 6), Mr. Houck is listed under the heading "Legal Support Personnel," along with a biographical outline of his educational

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[1]The Court accepted, without objection, as part of the record various documents filed without authenticating witnesses.

and business background and his availability as "Arbitrator, American Arbitration Association."

Pursuant to the agreement to arbitrate, the parties scheduled and attended the arbitration. ADM's corporate representative[2] at the mediation was Kent Clarke Kelley.

Immediately prior to the arbitration hearing, Gianelli discovered that Gray Harris represented Kelley in a 1992 securities case (*Neilson v. Garvey Commodities*, attached to Doc. No. 17, in which Kelley was found not liable for a customer's trading loss). This representation was not disclosed by Houck. Gianelli raised an issue as to this representation at the hearing. According to Gianelli, Houck said that he was unaware of the case, and Kelley said that the case was an "isolated incident" (Doc. 1, ¶ 26). Based on these assurances, Gianelli chose to go forward with the arbitration. Gianelli's claim was eventually denied in its entirety by Houck.

After the adverse award, Gianelli discovered that Kelley and related businesses were long standing clients of Gray Harris. The record reflects that in November of 1975, Gray Harris formed a corporation for a Kelley company (Doc. No.1, Ex. 8); in May 1976, the Firm formed two more companies for Kelley

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[2]Additionally, ADM was represented by counsel at the arbitration.

(Doc. No. 1, Ex. 9 and 10); in November 1976, the Firm represented yet another two Kelley companies (Doc. No. 1, Ex. 11 and 12). During 1977 through 1986, the Firm represented Kelley as executor of a large estate (Doc. No. 1, Ex. 13). Additionally, in 1977, the Firm represented Kelley individually and as trustee for real property (Doc. No. 1, Ex. 14); and represented a company of which Kelley was the President (Doc. No. 1, Ex. 15). More recently, the record reflects that until July 1995, the Firm represented Kelley as the personal representative of an estate (Doc. No. 1, Ex. 17).

Prior to the arbitration hearing, Houck had signed an Arbitrator's Oath, saying that he had "nothing to disclose." None of the Firm's representation of Kelley or related companies were disclosed. Kelley was not a named party to the arbitration or this suit.

ANALYSIS

Under the Federal Arbitration Act (9 U.S.C. § 10), a federal court can vacate an arbitration award only under certain conditions, including "where there was evident partiality or corruption in the arbitrators." Petitioner asserts that Houck was biased, in view of his association with a firm that represented the corporate representative of the Respondent.

In the seminal case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the Supreme Court addressed the issue in a plurality opinion that cautioned against the "appearance of bias" and held that arbitrators should

be required to "disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. In a concurrence, Justices White and Marshall refined this requirement, noting:

> The Court does not decide today that the arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function . . . [A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.

Id. at 150.

This Court has construed *Commonwealth* narrowly, holding that "evident partiality" exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration;" a mere "appearance of bias" is insufficient to vacate an award. *See Austin South I, Ltd. v. Barton-Malow, Co.* 799 F.Supp. 1135, 1142 (M.D. Fla. 1992), *quoted with approval in Park v. First Union*, 926 F.Supp. 1085 (M.D. Fla. 1996). The alleged partiality must be "direct, definite and capable of demonstration, rather than remote, uncertain and speculative," *Lifecare Intern., Inc. v. CD Medical*, 68 F.3d 429, 433 (11th Cir. 1995). At issue, then, is whether a reasonable person would

conclude that Houck was tainted with evident partiality for one party, based on his Firm's long standing relationship with the party's principal. Under the unique circumstances presented here, the Court finds that a reasonable person would reach that conclusion.

ADM argues that there is no evidence, other than the adverse award itself, that Houck was *actually* impartial. This is not a situation in which Houck had any demonstrable financial interest in the proceeding, nor is it alleged that Houck's firm was representing ADM in this proceeding, or, in fact, in any other proceeding. Thus, the Firm did not do any work for the parties, but rather for the principal of one of the parties, in unrelated capacities. Further, although Gianelli argues that Houck's knowledge of his firm's involvement is "presumed," Houck has affirmed that he was not familiar with the *Neilson* case and that he had nothing to disclose. Moreover, Gianelli notes that much of the Firm's representation of Kelley and related entities predates Houck's hiring. Those circumstances tend to show an absence of actual bias by Houck but do not fully address the standard of avoiding "evident partiality."

It is not necessary for there to be proof of actual bias. "Evident partiality" is present when undisclosed facts establish a reasonable impression of partiality. *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994), *citing Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197 at 1201 (11th Cir. 1982). Here, that impression is established by the undisclosed long standing and diverse nature of the Firm's representation of ADM's principal. Contrary to

Kelley's characterizations of the *Neilson* case as an "isolated incident," the record establishes a solid relationship that goes far beyond "trivial." Nor is Houck's apparent lack of a pecuniary interest in the outcome pivotal in the determination of a reasonable *impression* of partiality. The remaining arguments are best refuted by exploring Houck's relationship with the Firm and duties as an arbitrator.

Even if we accept Houck's contentions that he did not know of the Firm's representations, such a disavowal is not dispositive. "Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality. . . [A]n arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose." *Schmitz*, 20 F.3d at 1048. Houck had a duty, pursuant to the AAA rules, to disclose any circumstance likely to affect impartiality, including "any past or present relationship with the parties or their representatives" Rule 19, AAA Commercial Arbitration Rules, Ex. 4 to Verified Petition.[3] Thus, the Rules contemplate that *any* past or present relationship, by definition, is a circumstance that

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[3]Respondent's insistence that Kelley was not a "party" or a party "representative" is disingenuous. A corporation can only act through people. Kelley was present at the arbitration at the behest and on the behalf of ADM, and was at all relevant times, the corporate representative. Kelley was not an arms length low-level employee, he was actively involved in the matters leading up to the suit and was named over 50 times in the arbitration complaint, in connection with alleged wrongdoing. Moreover, the record contains a Guarantee Agreement personally executed by Kelley, in his individual capacity, which purports to guarantee ADM against any losses arising out of suits such as the present one. *See* Doc. No. 17, Ex. 3, pg. 15.

is likely to affect impartiality and *must* be disclosed.[4] The only logical way to discharge the obligation to disclose *any* past relationship is to conduct a reasonable investigation, such as a conflicts check. There is no suggestion in this record that this was done.

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[4]Note that the Rules do not limit disclosure to any *known* relationship.

Clearly, acting as sole arbitrator in a dispute involving a long standing client of the Firm would be inappropriate for an attorney. *See Schmitz*, 20 F.3d at 1048. Under other circumstances, it may not necessarily be inappropriate for non-attorneys who are merely law firm employees. Here, however, Houck is more than an employee. The Firm has advertised Houck as an arbitrator, citing his business and educational qualifications in Martindale-Hubbell. No other "legal support" person was mentioned in the professional listing, nor does Houck's listing limit (or indeed even mention) his position to one of office manager. Under these circumstances, Houck's unique status with the Firm creates obligations more akin to that of a lawyer with the Firm. As such, prior to accepting the role of arbitrator, Houck should have performed a conflicts check and should have disclosed to the AAA the results of that investigation. His failure to do so, resulting in Houck presiding over a dispute involving a long standing client, has created a reasonable impression of partiality, forcing the vacation of the award.[5] *Lifecare Intern., Inc. v. CD Medical*, 68 F.3d 429 (11th

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[5]We do not hold that Houck was actually biased against Petitioner. We hold, however, that the failure to investigate and disclose the relationship between Kelley and the Firm impermissibly precluded the parties from the opportunity to judge for themselves the substantiality of the relationships and the partiality of the arbitrator. "The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process . . ." *Commonwealth Coatings*, 393 U.S. at 151; "If the parties are to be judges of the arbitrators' partiality, duties to investigate and disclose conflicts must be enforced, even if later a court finds that no actual bias was present." *Schmitz*, 20 F.3d at 1049.

Cir. 1995), relied upon by Respondent, is not inconsistent with this result. In *Lifecare*, one of the arbitrators did not disclose that he had a previous unrelated scheduling dispute with an attorney who was associated with the large firm representing one of the parties in the arbitration.[6] The arbitrator had also recently become "of counsel" to a firm that had previously been interviewed for the purpose of obtaining representation in the dispute and, four years earlier, to review an amendment to the agreement between the parties. The Eleventh Circuit found the arbitrator's failure to investigate and disclose the above information to be "in violation of Canon II of the American Arbitration Association's Code of Ethics" *id.* at 435, but held, based on the "paltry record," that "we simply cannot conclude that Arbitrator Stein's conduct . . . rises to the level of creating a reasonable impression of bias or partiality." *Id.* In so holding, the Court noted:

> In summary, the "evident partiality" question necessarily entails a fact intensive inquiry. This is one area of the law which is highly dependent on the unique factual settings of each particular case. *Id.*

Here, we deal not with a potential client who had two limited contacts with the Firm, but rather an existing client and an intensive, long standing representation covering many matters and years. Moreover, unlike the arbitrator in *Lifecare*, part of the representation occurred during Houck's tenure as office manager.

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[6]The attorney in question was not involved in the arbitration.

Thus, the undisclosed facts present here unquestionably create a "reasonable impression of partiality" that is "direct, definite and capable of demonstration." *Id.* at 433.

ADM argues that even if the circumstances show evident partiality, the fact that Gianelli knew of the *Neilson* case and chose to proceed with Houck as arbitrator, waived any objections to conflicts. This Court disagrees. In *Middlesex*, 675 F.2d 1197, the arbitrator failed to disclose his significant connection to some of the parties. The successful party in the arbitration argued that the conflict was waived in that the other parties "knew or should have known" of the alleged partiality before the arbitration. The Eleventh Circuit rejected this contention, holding:

> We . . . find that waiver or estoppel would be inappropriate in view of the code of strict morality and fairness which shapes the arbitrator's affirmative duty of disclosure.[citing *Commonwealth*] . . . As the district court aptly stated, "for the arbitration process to work successfully, the onus must be placed on the arbitrator to reveal potential bias." Moreover, the neutral arbitrator signed an oath denying any relations with any of the parties.
>
> To hold, in the circumstances of this case, that the insurers waived their right to contest the alleged impartiality of the neutral arbitrator because the insurers did not discover evidence of partiality prior to arbitration

> would put a premium on concealment. *Waiver applies only where a party has acted with full knowledge of the facts* [citation omitted] 675 F.2d at 1204 [emphasis added].

If the *Neilson* case was truly an isolated representation, then Gianelli's proceeding with the arbitration could probably be considered a waiver. However, it is undisputed here that, prior to the arbitration, Houck did not disclose and Gianelli did not know of the numerous other representations over the years. Absent that knowledge, there is no effective waiver.

CONCLUSION

As Justice White stated in his concurrence in *Commonwealth Coatings:* "[I]t is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than a trivial business with a party, that fact must be disclosed." 393 U.S. at 151-2. Houck's failure to disclose his firm's substantial relationship with a representative of one of the parties, through inadvertence, neglect or otherwise, is sufficient to taint the arbitration and compel vacation of the award. The undersigned respectfully recommends that the Court **GRANT** the petition to vacate and **DENY** ADM's cross-petition to confirm the award.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10)

days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on November 20, 1996.

s/ David A. Baker
DAVID A. BAKER
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to:

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(2)

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No. 98-455

In The

Supreme Court of the United States

October Term, 1998

GIANELLI MONEY PURCHASE PLAN AND TRUST, PENELOPE GIANELLI, TRUSTEE,

Petitioner,

v.

ADM INVESTOR SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the non-prevailing party to an arbitration be allowed to seize on a prior relationship between the arbitrator's employer and a non-party witness as a pretext for invalidating an arbitration award on the basis of "evident partiality" where the uncontroverted record demonstrates that the arbitrator had no actual knowledge of such relationship?

PARTIES TO THE PROCEEDING

The petition contains no list of the parties to the proceeding.

Archer Daniels Midland Company, a publicly traded company, is the corporate parent of respondent ADM Investor Services, Inc. There are no non-wholly owned subsidiaries of ADM Investor Services, Inc.

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STATUTES

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CORRECTED STATEMENT OF THE CASE

I. The Arbitration Proceedings.

From late 1994 through mid-1995, Gianelli Money Purchase Plan and Trust, Penelope Gianelli, Trustee ("Gianelli") was a speculator in the commodity futures markets. Shortly after losing approximately $100,000, she filed a Statement of Claim with the American Arbitration Association ("AAA"), seeking to recoup those losses from her futures commission merchant, ADM Investor Services, Inc. ("ADM"). AAA's Commercial Rule 22 permits a party to " . . . be represented by counsel or other authorized representative." In the AAA proceeding, Gianelli was represented by the same law firm that appears on her Petition, and ADM was represented by the law firm of Neal, Gerber & Eisenberg ("NG&E"). Basic Commodities, Inc. ("Basic") is an introducing broker, which referred Gianelli's commodity trades to ADM for execution, clearance and confirmation. Neither Basic nor its president, Kent C. Kelley ("Kelley") was a party to the AAA proceedings, and this record contains no evidence that Kelley has ever been an officer, director or employee of ADM. Kelley was, however, a witness at the AAA hearing.

The wide-ranging allegations in Gianelli's AAA Statement of Claim included a reference to Basic and Kelley as respondents in a reparations claim (herein *"Neilson"*) previously heard and decided by an administrative law judge at the Commodity Futures Trading Commission. In responding to those allegations, ADM's AAA Answer (served on November 10, 1995) attached a complete copy of the *Neilson* decision. That attachment

disclosed that "Tracy A. Borgert, Esq. and G. Robertson Dilg, Esq., Orlando, Florida," attorneys affiliated with the Orlando law firm of Gray, Harris & Robinson ("Gray Harris"), had acted as attorneys for Kelley and Basic in *Neilson*.

Pursuant to AAA rules, the parties selected Keith W. Houck ("Houck") as the arbitrator to hear their dispute. Houck, a non-attorney, is Gray Harris' officer manager. That employment relationship was disclosed to the parties prior to his selection. On December 1, 1995, AAA sent a notice of appointment to Houck requesting that he:

> . . . disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social or of any other kind. . . . If you are aware of such a relationship, please describe below.

In response to this request, Houck placed an "X" next to the statement "I HAVE NOTHING TO DISCLOSE." Later that month, and in response to her discovery request, ADM produced to Gianelli a contract between it and Basic. That contract, personally guaranteed by Kelley, contained indemnification and hold harmless provisions covering ADM's liability to customers introduced to it by Basic.

The arbitration proceeded to hearing on January 25 and 26, 1996, but there is no stenographic or other record of those proceedings. In an award dated February 7, 1996, Houck ruled in favor of ADM, denying Gianelli's claims in their entirety.

II. The Proceedings Before The District Court.

Alleging Houck's "evident partiality," Gianelli filed a petition to vacate in the district court on May 2, 1996. The petition alleged that it was not until after Houck rendered his award that Gianelli discovered past contacts between Kelley and Gray Harris attorneys relative to the formation and representation of various businesses, all of which preceded Houck's employment with Gray Harris. ADM's district court answer to the petition to vacate denied that Gianelli's discovery had been post-arbitral (these same businesses had been referred to in Gianelli's AAA Statement of Claim), and Gianelli offered no proof in the district court that the Gray Harris-Kelley connections had not been discovered until after Houck's award was rendered.

In pertinent part, Gianelli's petition to vacate alleged: "In all likelihood, only formal discovery from Gray Harris of all of its representation of Kelley and his affiliates will lead to the truth." Gianelli never initiated any discovery in the district court, and as a result, this record is devoid of evidence of Kelley's ownership interest, if any, in those businesses represented by Gray Harris and devoid of evidence of the amount of attorneys fees, if any, paid by Kelley or anyone else for Gray Harris' services. Nor does the record contain any evidence regarding Houck's duties, responsibilities, access to proprietary client information, or his financial compensation as Gray Harris' office manager.

The petition also placed at issue the content of a colloquy that had taken place at the commencement of

the AAA hearing among Gianelli's attorney, Houck and Kelley. Gianelli's petition alleged:

> 24. Thus, at the commencement of the arbitration hearing counsel raised this Gray Harris representation [*Neilson*] to Mr. Houck, Mr. Kelley and Kelley's counsel. Gianelli asked if Mr. Houck was aware of the representation. Additionally, they were asked if Gray Harris had done any other legal work for Mr. Kelley or his affiliates
>
> 25. Mr. Houck, the sole arbitrator, indicated he was unaware of [*Neilson*].
>
> 26. Mr. Kelley indicated [*Neilson*] was an isolated incident.

ADM's Answer to the Petition contested those allegations by responding:

> 24-25. ADMIS admits that, at the commencement of the arbitration hearing, Petitioner's counsel inquired of Mr. Houck concerning his knowledge of the Kelley case and of Mr. Kelley, individually, and that counsel further inquired of Mr. Kelley as to his knowledge of or relationship with Mr. Houck. ADMIS further admits that Mr. Houck stated in response to that inquiry that he had no knowledge of his firm's prior involvement in the Kelley case and that he had no prior knowledge of Mr. Kelley and had never communicated with Mr. Kelley in any respect at any time prior to the commencement of these proceedings. ADMIS further admits that, in response to the inquiry from Petitioner's counsel, Mr. Kelley stated that he and Mr. Houck were "ships passing in the night" and

> that he (Mr. Kelley) had never previously communicated in any fashion with Mr. Houck. Except as herein admitted, the allegations of paragraph 24 are denied.
>
> 26. The allegations of paragraph 26 are denied.

The petition was referred to a magistrate, who heard the argument of counsel for the parties on September 4, 1996. At that hearing, Counsel for Gianelli conceded that there was nothing to suggest any actual relationship between Houck and Kelley:

> THE COURT: IS THERE ANYTHING HERE TO SUGGEST ANY ACTUAL RELATIONSHIP BETWEEN MR. HAUK AND MR. KELLY (PH.SPLGS.)?
>
> MR. RISHOI: NO SIR, NO SIR, NO – NO, NOT THAT – OF COURSE AS THE OFFICE MANAGER – THE ALLEGATION IS THAT – THAT, WITH THE LAW FIRM AND WITH VARIOUS LAWYERS AT THE LAW FIRM AND, OF COURSE, I THINK AS AN OFFICE MANAGER MR. HAUK WOULD NOT HAVE HAD PERSONAL CONTACT WITH A CLIENT AND IF HE HAD HAD PERSONAL CONTACT WITH MR. KELLY WE CERTAINLY DON'T KNOW ABOUT IT AND I THINK IT WOULD BE UNIQUE, TO BE FRANK WITH THE COURT, IT WOULD BE UNIQUE IF HE DID HAVE A PERSONAL RELATIONSHIP.

This record is devoid of any evidence of any relationship between (1) any Gray Harris attorney and ADM or its corporate parent, (2) Houck or any other employee of Gray Harris and ADM or its corporate parent, (3) any Gray Harris attorney and ADM's representative, NG&E,

and (4) Houck or any other employee of Gray Harris and NG&E. Gianelli's petition to vacate did not claim, nor is there any evidence in this record, that Houck was actually biased against Gianelli.

The district court found that Houck was not actually biased and also accepted as true Houck's asserted lack of actual knowledge of any Gray-Harris relationship with Kelley. (Pet. 17a, 18a) It proceeded, however, to impose a duty of investigation, and used Houck's "failure" to fulfill that "duty" as the basis to vacate the award, even though the record before it was completely silent with regard to whether Houck had performed a conflicts check, and if so, what persons or entities he had investigated. (Pet. 19a) Finally, the district court accepted as true the allegations of paragraph 26 of the petition, even though ADM had denied those allegations and Gianelli had offered no proof in support of them.[1] (Pet. 14a, 17a, 18a)

III. The Proceedings Before The Eleventh Circuit.

On appeal, Gianelli argued that the vacatur of the arbitral award should be affirmed because it passed a geographically based "smell test." Gianelli reasoned that "the further a court is physically removed from an alleged odor the less apt it is to uncover the alleged partiality." No caselaw or other legal authority was cited for this proposition. ADM argued, as it had in the district court, that where the record shows an unequivocal lack of actual knowledge of the facts claimed to give rise to the

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[1] On appeal, this same error was repeated. (Pet. 3a)

alleged "evident partiality," the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") imposes no duty to investigate. ADM also argued that the district court's decision was in numerous respects devoid of support in the record, and that the Eleventh Circuit's "direct, definite and capable of demonstration" standard for vacatur of an award under the FAA could not be met by imputing knowledge from Gray Harris' lawyers to Houck, a mere partnership employee. The Eleventh Circuit reversed and remanded with instructions to grant ADM's cross-petition for confirmation of the award. (Pet. 11a) In so holding, the court found that the absence of actual bias by Houck and the absence of his actual knowledge of the undisclosed relationship between Kelley and Gray Harris precluded any conclusion that the award was tainted by "evident partiality." (Pet. 10a-11a)

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Decision Does Not Conflict With This Court's Holding In *Commonwealth Coatings*.

Gianelli attempts to expand the scope of this Court's ruling in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), to hold that it is appropriate to vacate an arbitration award on the basis of "evident partiality" by showing that the arbitrator "should have known he had an undisclosed conflict of interest." (Pet. 13) Thus, Gianelli asserts, the Eleventh Circuit's opinion is in "conflict" with *Commonwealth Coatings*. (Pet. 12) There is, however, no support for Gianelli's overly expansive reading of *Commonwealth Coatings*, which was a pure

"actual knowledge" case. In his concurring opinion, Justice White expressly noted the limited scope of this Court's ruling, stating that:

> . . . it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.

Id. at 151-52. Writing for the majority, Justice Black observed that:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Id. at 149. Both of these statements beg to be read in the context in which they were written: an arbitrator with actual knowledge of – and no need to "investigate" – a direct, ongoing business relationship with one of the parties had refused to disclose that relationship to the opposing party. Taking the word "requirement" completely out of the context of Justice Black's comments, Gianelli extrapolates that *Commonwealth Coatings* "requires" not only *disclosure* of "all dealings that might create an impression of possible bias," but also an *investigation* into facts previously unknown to the arbitrator that might give rise to such an impression. (Pet. 17) That broad-brushed reading extends *Commonwealth Coatings* far beyond its actual holding or any reasonable inferences that can be drawn from it.

Gianelli further distorts *Commonwealth Coatings* by asserting that there is a "similarity of the facts in *Commonwealth* and the instant case." (Pet. 13) Quite to the contrary, there is a blatant disparity in factual settings and, for that very reason, there was no need for *Commonwealth Coatings* to address – even indirectly – the true issue in the instant case. Similarly, there was no need for the Eleventh Circuit to even cite to *Commonwealth Coatings* in Gianelli. In *Commonwealth Coatings*, the arbitrator had actual knowledge of a relationship with an arbitration party but failed to disclose that fact prior to the hearing. Here, and as set forth above, Gianelli never even contested arbitrator Houck's lack of actual knowledge of his employer's prior relationship with a non-party agent of ADM. In *Commonwealth Coatings*, the arbitrator's direct and ongoing relationship with an arbitration party extended so far as to include the very dispute before the arbitration panel. Here, there is no relationship of any nature whatsoever between Houck and any party, any witness (including Kelley) or any law firm representing a party. The prior relationship between Houck's employer (Gray Harris) and a non-party agent of ADM was far removed from the subject-matter of the arbitration. In *Commonwealth Coatings*, the arbitrator's long-standing relationship with an arbitration party was ongoing. In *Gianelli*, the sporadic relationship between the Houck's employer and a non-party agent of ADM had ceased.

Gianelli next advances the supposition that it is too difficult for a non-prevailing party to unearth the truth about a relationship between his adversary and an arbitrator because unscrupulous arbitrators cover their tracks

and make the truth undiscoverable. Thus, Gianelli's argument goes, this case presents an ideal opportunity for this Court to extend the duty to disclose set forth in *Commonwealth Coatings* to encompass all arbitrators, those who are forthcoming as well as those attempting to gain personal advantage by carefully concealing favoritism and bias for one party over another. What is apparently lost on Gianelli is that this Court's standard, as articulated thirty years ago, *does* apply evenly to all arbitrators, regardless of state of mind. Simply put, all known facts must be disclosed. Here, arbitrator Houck met that standard; he did disclose what he knew. With respect to the Kelley-Gray Harris relationship, he knew absolutely nothing. Gianelli nevertheless waited until after the adverse award and then cried foul. Justice White anticipated that relationships may "come to light after the arbitration, when a suspicious or disgruntled party can seize on [a relationship] as a pretext for invalidating an award", yet did not require an arbitrator to do anything more, instead calling the assessment of an arbitrator's partiality a "role [ ] best consigned to the parties." 393 U.S. at 151. That is precisely what the Eleventh Circuit did in *Gianelli* – it left the assessment of Houck's partiality to Gianelli who took no steps to determine what, if anything, Houck knew but failed to disclose. Clearly, the Eleventh Circuit's decision in this case enjoys a peaceful coexistence with *Commonwealth Coatings*. Even if, as Gianelli suggests, this Court was "quite divided" in *Commonwealth Coatings* (Pet. 20), it certainly was not with respect to any issue that is presented here. *Commonwealth Coatings* has withstood the test of time over three decades, and the gross disparity in facts between it and this case

give rise to no reason for this Court to revisit its 1968 decision.

II. The Factual Record Of This Case Makes It An Unsuitable Vehicle To Address The Split In Circuit Authority.

The ultimate question that Gianelli would like to raise before this Court is who has the duty to investigate the background or relationships of an arbitrator, above and beyond those known facts that he clearly has a duty to disclose – is it the arbitrator or does that burden fall on the arbitration parties? Perhaps this question may be squarely presented in some other case, but it does not exist here. Just two years ago, this Court was presented with that very issue, but voted not to grant certiorari. *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (D.C. Cir.), *cert. denied*, 117 S. Ct. 432, 136 L. Ed. 2d 331 (1996). In *Al-Harbi*, the arbitrator did not know that his former law firm had represented one of the parties on a matter unrelated to the arbitral dispute. The court held that there was no duty to investigate the existence of such a "relationship" and, therefore, the arbitrator's failure to investigate or disclose those facts did not constitute "evident partiality." The question presented for review in that case was:

> Does arbitrator have pre-arbitration duty to make reasonable investigation to discover and disclose conflicts of interest that may constitute "evident partiality" as that term is used in Federal Arbitration Act, 9 USC 10(a)(2)?

65 U.S.L.W. 3205 (October 1, 1996).

On a related issue – whether an attorney-arbitrator's failure to perform a proper conflicts check can constitute evident partiality – there is a split in authority among the Circuit Courts. In *Lifecare Intern., Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995), the Eleventh Circuit held that "evident partiality" can be found only where "either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exits." (Pet. 10a) On the other hand, in *Schmitz*, the Ninth Circuit held that an attorney-arbitrator's failure to investigate could, under certain circumstances, rise to the level of "evident partiality" and thereby require vacatur of an award. The award in *Schmitz* was vacated on the basis of evident partiality because the conflicts check performed by the attorney-arbitrator did not encompass a party's corporate parent for which his law firm had performed legal services.

Therein lies the "split": *Lifecare*'s two methods of demonstrating evident partiality versus yet a third alternative set forth in *Schmitz*; the Eleventh Circuit versus the Ninth Circuit. The Seventh and Fourth Circuits agree with the approach taken by the Eleventh Circuit. *See, Health Services Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 663 (7th Cir. 1983); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993). No other Circuit has embraced the Ninth Circuit's approach. Contrary to Gianelli's assertion, the Eighth Circuit does not join *Schmitz* in allowing vacatur of awards where the attorney-arbitrator "should have known" of a conflict between his law firm and an arbitration party. Gianelli claims that *Olson v.*

Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995), cites *Schmitz* "with approval" (Pet. 25), but *Olson* involved a failure to disclose actual knowledge (just as in *Commonwealth Coatings, supra*), and is clearly in harmony with the Eleventh Circuit's decision in *Middlesex Mutual Insurance Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982).

This Court need not expend its precious resources resolving the "conflict" between the instant case and *Schmitz* because the two cases are truly distinguishable. In *Schmitz*, as noted above, the court concluded that the attorney-arbitrator should have discovered his partners' work for the corporate parent of the arbitration respondent and, therefore, imposed constructive knowledge of that relationship on him. Here, if Houck, a non-attorney employee of a law firm, had performed precisely the type of conflicts check envisioned in *Schmitz* (perhaps he did – this record is, yet again, silent), he still would not have gained knowledge of the Gray Harris-Kelley relationship since it did not involve a party, the parent company of a party, or even a party's representative. Moreover, even if Houck had conducted an investigation that somehow unearthed the Gray Harris-Kelley relationship, there would still remain the question (not reached under the Eleventh Circuit's analysis) of whether that type of far more attenuated, prior "relationship" could meet the *Schmitz* standard for evident partiality.

If the divergence of opinion between *Lifecare* and *Schmitz* involves a truly recurring set of facts, then this Court will soon be presented with a case that provides the requisite record for a clear articulation of an attorney-

arbitrator's duty – if any – to investigate whether his firm has a real or potential conflict of interest and, in the absence of an investigation, under what circumstances knowledge of a "conflict" will nevertheless be imputed to him. *Gianelli* simply is not that case.

III. This Case Does Not Present An Opportunity To Resolve An Important Federal Question Of A Recurring Nature.

This case rests on unique circumstances that are not likely to recur. First, the "relationship" at issue here is an attenuated, indirect one between the arbitrator's employer and a party's agent. The agent's dealings with the arbitrator's employer were also utterly unrelated to the scope of the agency with the arbitration party. In other words, it is two steps removed from the typical direct "business dealings" that arbitrators are required to disclose. Second, arbitrator Houck's lack of actual knowledge is not disputed whereas, in the typical case, one party claims that the arbitrator actually possessed knowledge that went undisclosed. Third, the record below provides not even a hint as to what, if anything, arbitrator Houck actually did to satisfy any duty to investigate that may or may not be imposed under the FAA. Because Gianelli inexplicably, but deliberately, chose not to engage in "formal discovery" (the sole means by which she could have learned about arbitrator Houck's investigative efforts), this Court would be left only to surmise or assume with respect to those pivotal facts. Given the undeveloped record in the district court and the complete absence of an arbitral record, review of the Eleventh Circuit's decision would necessarily be confined to its

peculiar facts (and the absence of facts in the record). It is, therefore, unlikely that this Court's decision – whatever it might be – could provide significant guidance to lower courts.

Lastly, Gianelli has further muddied the waters by making unfounded accusations of fraud against Kelley. (Pet. ii) However, as observed in *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F.Supp. 107, 112 (D.D.C. 1976), there is not a whit of authority for the proposition that an arbitrator's decision should be set aside on the basis of evident partiality where a party (or a non-party witness) – not the arbitrator – knew but did not disclose facts that might have created an impression of possible bias. Gianelli's threatened "fraud" argument apparently emanates from the disputed colloquy at the outset of the arbitration hearing, of which there is no transcript or other record. Again, this record is devoid of the requisite facts that would enable the Court to make an informed assessment of the "fraud" allegations – belatedly raised for the first time in the Petition. The mere presence of the fraud allegations, however, makes this case even less suitable for further review because Gianelli could have (but did not) make this argument to the Eleventh Circuit.

IV. No Legitimate Policy Issue Favors Granting The Writ.

In a final effort to obtain further review of the Eleventh Circuit's decision, Gianelli invokes a disjointed public policy argument that the FAA must be construed consistently and, if possible, so as to encourage the use of arbitration. (Pet. 16-17, 22-23) ADM cannot envision how

the popularity of arbitration as an alternative dispute resolution forum could be enhanced if the Eleventh Circuit's decision was reversed. Parties such as ADM would be extremely reluctant to choose an arbitral forum if it was possible that a favorable award might be later set aside because the non-prevailing party had dredged up an attenuated relationship between the arbitrator's employer, a non-party representative, then used that information as the basis to claim "evident partiality" even though the arbitrator – and in this case ADM itself – at all times remained completely ignorant of the allegedly prejudicial relationship. Encouraging non-prevailing parties to engage in post-arbitral "sour grapes" fishing expeditions for any shred of a remote connection between the arbitrator and the prevailing party would increase the costs of arbitration, increase the frequency of judicial review of arbitration awards, and ultimately discourage the public's use of arbitration.

CONCLUSION

Gianelli is not inconsistent with, much less contrary to, the letter or the spirit of *Commonwealth Coatings*. If the FAA imposes a duty to investigate, *Gianelli* is not the dispute through which to address and resolve that issue because both the Eleventh Circuit's decision and this record are completely silent on the nature and extent of Houck's investigative efforts. As a necessary consequence of that silence, this Court's opinion would be purely advisory. Finally, no legitimate arbitral policy issue is presented by the petition. Gianelli argues only that this

Court should countenance her gambit that the legal fiction of constructive knowledge should be played as a trump card over admitted lack of knowledge, thereby voiding the result of an arbitral process that was, in fact, played by the rules. For each of the reasons stated above, the Petition should be denied.

Respectfully submitted,

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